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No. 90-

IN THE

Supreme Court of The United States

October Term, 1990

NEW YORK CITY PUBLIC UTILITY SERVICE,

Petitioner,

-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal Energy Regulatory Commission's definition of "public body" that excludes public entities which sell power at retail and have access to distribution facilities through lease or contract, rather than owning or physically controlling such facilities, is consistent with the language and intent of the Niagara Redevelopment Act.

2. Whether the Federal Energy Regulatory Commission's definition of "yardstick competitor" that excludes public entities which do not totally displace investor-owned utilities, but do compete with them for power sales both inside and outside the franchise area and whose rates serve as a yardstick for regulators, is consistent with the language and intent of the Niagara Redevelopment Act.

3. Whether the Federal Energy Regulatory Commission's definition of "public body" that excludes public entities which sell and distribute power to satisfy the partial requirements of customers who are also supplied by investor-owned utilities, is consistent with the language and intent of the Niagara Redevelopment Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit were those in the caption, and, as petitioners: Allegheny Electric Cooperative, Inc., Vermont Department of Public Service, Upstate Public Utility Services Association, County of Westchester Public Utility Service Agency, James E. O'Neil, Attorney General of the State of Rhode Island and the Rhode Island Public Utilities Commission, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company, and Power Authority of the State of New York. The Vermont Department of Public Service and the County of Westchester Public Utility Service Agency petition separately for certiorari.

As intervenors: Allegheny Electric Cooperative, Inc., Municipal Electric Utilities Association of New York State, Public Power Association of New Jersey, New York State Electric & Gas Corporation, City of Cleveland, Ohio, Public Service Electric & Gas Company, City of New York, Port Authority of New York and New Jersey, Connecticut Municipal Electric Energy Cooperative and Massachusetts Municipal Wholesale Electric Company.

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NEW YORK CITY PUBLIC UTILITY SERVICE,

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-against-

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered in this action on December 17, 1990, rehearing denied February 12, 1991.

OPINIONS BELOW

The decision of the Federal Energy Regulatory Commission ("the Commission") is reported at 48 FERC ¶ 61,124 (1989)(Opinion 329)(64-109a).[1] The decision of the Commission denying rehearing is reported at 49 FERC ¶ 61,068 (1989)(110-114a). The decision of the Court of Appeals is reported at 922 F.2d 73 (2d Cir. 1990)(1-24a).

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1990 (1a). The Second Circuit denied rehearing on February 12, 1991 (115a). This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 836 of Title 16 of the United States Code is set forth in the Appendix (116a).

STATEMENT OF THE CASE

This case arises out of the ongoing battle for inexpensive electric power at a time of rising power costs. In New York City, for example, Consolidated Edison Company ("Con Edison"), a private investor-owned utility, charges residential customers almost 16¢ a kilowatt hour, on average; municipal utilities in New York State that own distribution facilities and meet all or most of their power requirements with inexpensive hydroelectric power, charge, on average, 3¢ a kilowatt hour. (2631-32A, Vol. IX). The challenge here is to the Commission's interpretation of what

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[1] The opinion is reprinted in the Appendix to the Petition for Writ of Certiorari. The Appendix is jointly filed by petitioner herein and by the Vermont Department of Public Service, and the County of Westchester Public Utility Service Agency which petition separately for review by this Court. Citations to the Appendix are made to the page number therein as "___a". Materials not included in the Appendix appended hereto but which appeared in the Joint Appendix filed in the Court of Appeals shall be referred to as "____ A, Vol. ____". "R. ___" refers to the record below.

Congress meant in 1957 when it enacted the Niagara Redevelopment Act, giving a preference for allocations of limited, inexpensive hydropower to "public bodies."

The Niagara Redevelopment Act ("NRA") authorized the Commission to issue a license to the Power Authority of the State of New York ("Power Authority") to construct and operate a hydroelectric project "with capacity to utilize all of the United States share of the water of the Niagara River permitted to be used by international agreement." 16 U.S.C. § 836(a). Section 836(b)(1) of the NRA provides that "public bodies" and nonprofit cooperatives shall be eligible for allocations of inexpensive hydroelectric power, known as "preference power," from the Niagara Project. Article 20 of the Project license, taken verbatim from the NRA, provides:

> (1)In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 per centum of the project power shall give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance.

16 U.S.C. § 836(b)(1). Article 21 of the Project license further provides that a reasonable portion (not to exceed 20%) of the preference power shall be made available "for use within reasonable economic transmission distance in neighboring States." 16 U.S.C. § 836(b)(2).

In 1960, the Power Authority began entering into long-term contracts for preference power from the Niagara Project, which were set to expire on June 30, 1985. (2878-79A, Vol. IX). Under these contracts, in-state preference power had been allocated to rural electric cooperatives in the State, and to municipalities that owned distribution facilities. These municipal systems were members of the Municipal Electric Utilities Association ("MEUA"), intervenors below.

In anticipation of the expiration of the in-state contracts for the sale of preference power, municipalities throughout the State

of New York began to form publicly owned entities under New York General Municipal Law Article 14-A.[2] Petitioner New York City Public Utility Service ("NYCPUS") was approved by public referenda and created in 1982 to "establish, construct, lease, purchase, own, acquire, use and/or operate facilities... for the purpose of furnishing ... any service similar to that furnished by any public utility company ...." (360A, Vol. II). Petitioner does not own distribution facilities; instead, it sells and distributes power to its customers at retail over distribution facilities leased from Con Edison, an investor-owned utility. On July 1, 1985, the Power Authority included petitioner and similar public entities in its allocation of preference power. (2894-96A, Vol. IX).

Recognizing that the Power Authority's allocation of a small amount of preference power would serve only a fraction of the total electrical requirements of all City consumers, petitioner chose to target its hydropower to manufacturers, some of whom were relocating within the metropolitan area, particularly in New Jersey, where electric costs typically are lower. By targeting this customer class, petitioner increased the likelihood that these employers would remain in or move into the City. (R. 5684-85). These sales also provided a clear example to consumers of the value of a public power alternative. Petitioner sold and distributed 60% of its hydropower to about 5,000 manufacturers, who received approximately 50% of their electricity requirements from petitioner. The remainder of the hydropower was allocated to approximately 2.1 million residential customers. (143A, Vol. I; R. 5684-86, 1659).

On March 26, 1985, the Power Authority approved preference contracts with seven neighboring states,[3] including the Vermont Department of Public Service ("VDPS"), based on the

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[2] When the Niagara Project went into service in 1961, there was no significant cost advantage to switching to Niagara Project power. It was only at the time of the 1973 oil embargo "which drastically increased the price of fossil fuels, followed by double-digit inflation" that hydropower became a "prized commodity." *Power Authority of the State of New York v. FERC*, 743 F.2d 93, 99-100 (2d Cir. 1984) ("*PASNY*").

[3] The seven neighboring states were Pennsylvania, Ohio, New Jersey, Massachusetts, Connecticut, Rhode Island and Vermont.

holding of the Federal Energy Regulatory Commission, 55 FPC 1109 (1976), that VDPS was a "public body." (2901-03A, Vol. IX). But on March 27, 1985, the Commission issued Opinion 229 in which it decided that VDPS was not an NRA "public body" because VDPS was selling preference power to private utilities at wholesale instead of selling directly to customers at retail.[4] Vermont then enacted a new statute intended to bring VDPS within the Commission's definition of "public body," and the Power Authority included VDPS in the preference allocation to neighboring states. (2903A, Vol. IX).

This case was initiated by two complaints which were filed with the Commission in 1986 challenging the Power Authority's July 1985 allocations of "preference power" to petitioner and similar public entities, and VDPS.[5] The two complaints were consolidated, and a month-long hearing was held before an Administrative Law Judge ("ALJ"). In his initial decision, the ALJ articulated criteria for defining a "public body" and concluded that petitioner and VDPS were not eligible to receive preference power. (25-63a). By a vote of 4 to 1,[6] the Commission affirmed the ALJ's decision and adopted his rationale. (64-109a).

The Commission held that the essential characteristics of a public body rest on its capability of selling and distributing power

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[4] *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, 30 FERC ¶ 61,323 (1985) (Opinion 229), *clarified and rehearing denied*, 32 FERC ¶ 61,194 (1985) (Opinion 229-A), *aff'd, Metropolitan Transportation Authority v. FERC*, 796 F.2d 584 (2d Cir. 1986) ("*MTA*"), *cert. denied*, 479 U.S. 1085 (1987).

[5] One complaint was filed by MEUA and the second complaint by the Massachusetts Municipal Wholesale Electric Company ("MMWEC") and the Connecticut Municipal Electric Energy Cooperative ("CMEEC"). These complainants are associations of public entities that have been receiving preference power.

[6] The dissent by Commissioner Stalon does not appear to be reflected in the reported version of the case, but it is reflected on the videotape of the Commission's session and was not disputed below. *See* Petitioners' Joint Brief, July 19, 1990, at 11. *See also* dissent by Commissioner Stalon in *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, *supra* n.4, 30 FERC at 61,659.

directly to consumers of electricity at retail. The Commission, first, required public bodies to provide yardstick competition by (a) posing a threat of takeover and displacement of investor-owned utilities, (b) substantially meeting the energy needs of their customers, and (c) providing an opportunity for rate and quality of service comparison. (88a). Second, the Commission determined that a public body must be directly responsible to its retail customers for electricity sold and delivered by deciding how to meet customers' requirements. Third, the Commission decided that a public body must maintain control of the distribution system "without restraint," with the power to employ cost cutting measures. (72-73a, 88-89a). According to the Commission, petitioner and others similarly situated did not qualify as public bodies because there was "insufficient separation of functions between [petitioner and the investor-owned utility] to create a threat of displacement, to allow [petitioner] substantially to serve [its] customers' needs, or to provide an opportunity for rate comparison." (95a).

The Second Circuit affirmed the Commission's order (1-24a). Although the Court of Appeals agreed with petitioners below that the NRA itself does not impose the "strict standards" articulated by the Commission for public body eligibility, the Court deferred to the Commission's three-pronged public body test. (14a, 16-17a). The Court held that a public body's competitive role could not be achieved without "active management control over the distribution of preference power." (17a). The Court upheld the Commission's conclusion that petitioner and other similar entities did not qualify as public bodies because they "lacked the requisite degree of control over distribution." (20a).

Under the Commission's criteria, only those municipal utilities that own or physically control distribution facilities are eligible "public bodies." As a consequence, the allocation of preference power will likely remain frozen as it is today, benefitting approximately 2% of the State's residential electric customers (2883A, Vol. IX). Few new public bodies will be likely to enter the public power market: it is no longer economically feasible to duplicate or condemn a private utility's distribution system in order to qualify as a public body (126-27A, Vol. I), and it is not possible, particularly in areas as large as the New York

metropolitan area, to ensure that there will be enough preference power to fully supply customers' needs.[7] The few municipal systems that do qualify will continue to sell power so cheaply that there is no incentive to conserve; energy consumption by customers of municipal systems has grown at a rate significantly greater than that of customers of private investor-owned utilities (2883A; Vol. IX). The Commission's decision effectively limits opportunities for increased competition in the electric utility marketplace -- it closes the door to new entrants who cannot totally displace investor-owned utilities, but who can compete with them for part of their load by selling power to consumers and arranging for distribution by lease or contract.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW CONCERNING THE ELIGIBILITY OF PUBLIC ENTITIES FOR ALLOCATIONS OF PREFERENCE POWER.

This case presents the important question of whether Congress intended to favor with allocations of inexpensive preference hydropower only those public entities that own or physically control distribution facilities, and to deny this limited resource to public entities that sell power to consumers at retail and distribute that power over the facilities of investor-owned utilities pursuant to contract or lease. The impact of the Commission's decision is significant not only for public entities within New York State, where the Niagara Project is located, but for public entities in all states within economic transmission distance, including Vermont, Massachusetts, Connecticut, Rhode Island, Ohio, New Jersey and Pennsylvania. In addition, there are many other statutes affecting

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[7] Without a guarantee of full requirements at inexpensive preference power rates, the Town of Massena, for example -- one of the few municipalities in New York to take over a private system -- might have had to rethink its decision. (91-92A, Vol. I).

different parts of the country that mandate preferences for various types of public bodies.[8]

The Tenth Circuit recently considered the meaning of the preference clause in the Colorado River Storage Project Act, 43 U.S.C. §620c, which incorporates the preference provision of the Reclamation Project Act of 1939, 43 U.S.C. § 485h(c). *Salt Lake City v. Western Area Power Administration*, 926 F.2d 974 (10th Cir. 1991). By a vote of two to one, the Court of Appeals upheld the determination by the Western Area Power Administration that the statutory preference for "municipalities and other public corporations or agencies" did not mean that preference should be given to all municipalities, but only to municipalities that operate their own utility systems. *Id.* at 978-79. The dissent relied on the plain language of the statute to find that all "municipalities" -- not just "municipalities with utility responsibility" -- were eligible preference entities. *Id.* at 984.

This Court has previously recognized the importance of questions relating to a statutory preference for limited public power. In *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, 467 U.S. 380 (1984), this Court -- "[b]ecause of the importance of the issue," *id.* at 389 -- considered the impact on the preference clause of the Bonneville Project Act ("BPA") of the Pacific Northwest Electric Power Planning and Conservation Act, enacted by Congress in 1980 "to avert what appeared to be an emerging customer struggle for BPA power." *Id.* at 383. Similarly

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[8] *See, e.g.*, 16 U.S.C. §§833b, 833c (Fort Peck Project) (preference given to public bodies defined as "States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof"); 16 U.S.C. §§832b, 832c (Bonneville Project) (same); 16 U.S.C. §831i (Tennessee Valley Authority) (preference given to States, counties and municipalities, including public agencies, and cooperatives); 43 U.S.C. §485h(c) (Reclamation Project) (preference given to municipalities and other public corporations or agencies); 43 U.S.C. §620c (Colorado River Storage Project) (same); Flood Control Act, 16 U.S.C. § 825s (preference to "public bodies and cooperatives").

here, the meaning of the NRA's preference provision should be resolved by this Court.[9]

A. The Commission And The Second Circuit's Limited View Of Competition Presents A Significant Issue Necessitating Resolution By This Court.

The Second Circuit upheld the Commission's view that the competitive benefits intended by Congress could not be realized unless public entities maintained day-to-day control over distribution facilities. (16-17a, 21a). Indeed, the Court of Appeals found that "the most compelling argument" against the leasing or contractual arrangements before it was that "the distribution costs of the lessee public entity and the lessor private utility will always be the same," thus precluding competition. (21a). This holding conflicts with decisions of other Courts of Appeals recognizing that competition is enhanced even when the operations of one market participant are dependent on access to facilities owned by another.

For example, in the natural gas industry, the Commission itself has ruled that pipeline companies -- who had previously refused to "transport gas for third parties where to do so would displace their own sales" -- must open access to their transportation services. *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). The Court of Appeals for the District of Columbia recognized that the Commission's order to pipeline companies to "transport the gas with which their own sales compete," *id.* at 994, would remedy a lack of competition "by exposing pipelines to competition and its normal consequences." *Id.* at 1001.

Similarly in the telecommunications industry, competition is enhanced when a private utility provides access to essential dis-

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[9] This Court previously considered the NRA in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). The Court noted that the preference provision and other licensing conditions mandated in the statute resolved disagreements that had "continued through eight sessions of Committee Hearings, during which more than 30 proposed bills were considered, in the Eighty-first to Eighty-fifth Congresses, and delayed congressional authorization of the project for seven years." *Id.* at 102 (footnote omitted).

tribution facilities. *See MCI Communications Corp. v. American Telephone and Telegraph Co.*, 708 F.2d 1081, 1133 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The fact that the costs of leasing or contracting for use of a competitor's facilities may be the same as the costs to the owner of the facilities does not detract from the enhanced competitive benefits of open access.

Notwithstanding its use of a competitor's facilities, petitioner provides enhanced competition in the utility marketplace as envisioned by Congress when it enacted the NRA. First, petitioner competes directly with the private utility for all or part of the business of retail customers; every kilowatt hour sold by petitioner is a kilowatt hour lost to Con Edison. (R. 3071-72, 1776). Petitioner also competes with private utilities outside the franchise area by inducing businesses to stay in and move to New York City, rather than to other nearby areas, including New Jersey. (R. 5684-86). *See City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 930 (2d Cir. 1981).

Second, petitioner competes as a yardstick, using its lower hydropower rates to "force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return." *MTA*, *supra* n.4, 796 F.2d at 592, *citing PASNY*, *supra* n.2, 743 F.2d at 105. Third, petitioner provides customers with the opportunity to make cost comparisons by looking at their bills, thus encouraging customers to challenge the investor-owned utility to increase in efficiency. (437-38A, Vol. II). In affirming the Commission's order, the Second Circuit ignored petitioner's competitive roles, and failed to recognize that petitioner's access to an investor-owned utility's distribution system for a reasonable fee promotes, rather than precludes, competition.

B. The Commission And The Second Circuit's View Of Yardstick Competition In This Case Is Contrary To Congressional Intent.

In adopting the NRA, Congress intended to incorporate the principle of "yardstick competition." *PASNY*, *supra* n.2, 743 F.2d at 105; *MTA*, *supra* n.4, 796 F.2d at 591-93, *citing* S. Rep. No. 539, 85th Cong., 1st Sess. 7 (1957); *Development of Power at Niagara Falls, N.Y.: Hearings Before a Subcommittee of the Committee on*

Public Works on S. 512 and S. 1037, 85th Cong., 1st Sess. 12-13 (1957). It was Congress' hope that public bodies

> would act as yardsticks by using their *supply of hydropower* to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which *regulators* could set the private utilities' rate of return.

MTA, *supra* n.4, 796 F.2d at 592 (emphasis supplied).

In this case, however, the Commission and the Court of Appeals took a new view of yardstick competition that contravenes congressional intent. First, rather than accepting Congress' view that it was the "supply of hydropower" which enables public bodies to act as yardsticks and charge lower rates, the Court of Appeals upheld the Commission's view that it was the allegedly lower distribution costs of a municipal utility which enable it to act as a yardstick and charge lower rates.[10] (21a). Second, rather than accepting Congress' view that a public body's low rates would serve as a "regulatory" yardstick -- by which regulators could set a private utility's rate of return -- the Court of Appeals upheld the Commission when it essentially repudiated that test,[11] and opted instead for a requirement that consumers, and not regulators, have the opportunity to compare rates. (73a, 88a).[12]

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[10] In fact, the distribution costs of the town of Massena's municipal utility are higher than those of Niagara Mohawk, the relevant investor-owned utility. (2631-32A, Vol. IX).

[11] The Commission adopted the ALJ's yardstick competition criteria, including the requirement that a public body "provide an opportunity for consumers [not regulators] to compare the rates and quality of service of the public utility with that of the IOU." (73a). The Commission specifically rejected petitioner's kind of competition because it "do[es] not relate to consumer rate comparisons but to 'regulatory' comparisons." (88a).

[12] The Commission found that petitioner failed to meet the new "consumer rate comparison" test because petitioner's bills to consumers showed only the savings attributable to preference power,

(Footnote Continued)

In accordance with Congressional intent, petitioner -- whose rates for hydropower did in the past and would in the future serve as a regulatory yardstick -- should be eligible as a yardstick competitor. By requiring that a public body pose a threat of displacement, substantially meet customers' energy needs and provide consumers an opportunity to make rate and quality of service comparisons, the Commission's "yardstick competition" test as upheld by the Second Circuit imposes a far more restrictive burden on public entities than the statute mandates and violates Congress' intent in enacting the NRA. *See Sullivan v. Zebley*, 110 S.Ct. 885 (1990).[13]

II. THE DEGREE OF DEFERENCE ACCORDED THE COMMISSION BY THE SECOND CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT.

In this case, the Commission failed to exercise its own judgment, particularly with respect to the requirement that a public body own or physically control a distribution system. The Commission based its order on the prior decision of the Court of Appeals for the Second Circuit in the *MTA* case, *supra* n.4. In *MTA*, the Court of Appeals held that despite the broad literal meaning of the term "public bodies," Congress intended the term to be limited to "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail." *MTA*, *supra* n.4, 796 F.2d at 591.

(Footnote Continued)
but not rates. (95a). This clearly glorifies form over substance; for consumers, it is the savings that cause their interest and motivate them to press for lower investor-owned utility rates.

[13] The Commission claims that petitioner is ineligible for public body status because petitioner's customers were also customers of a private utility, and customers of a private utility were not meant by Congress to receive preference power directly, but to benefit only indirectly, from additional competition in the marketplace (85a, 87-88a). Far from contravening Congressional intent, however, the competitive purpose of the statute is enhanced by the presence of dual suppliers. Preference power sold at retail by petitioner to consumers is not power sold to them as customers of the private utilities, but in their status as customers of petitioner, thus satisfying the Congressional purpose in enacting the NRA.

The Court of Appeals in the *MTA* case did not hold that an entity qualifies as a public body only if it owns or physically controls a distribution system; indeed, the Court of Appeals itself admits that it did not rule on "the legitimacy of the kind of leasing arrangements currently before us" in this case. (15a). Yet the Commission, in articulating its "control" criteria, concluded that the Court of Appeals' decision in *MTA* left it no choice in the matter. The Commission specifically stated that "the [*MTA*] court cited legislative history requiring that the 'public body' *must* control distribution." (86a)(emphasis supplied).[14] The Commission further noted that the "ALJ correctly found that to 'sell and distribute power directly to consumers of electricity at retail' *requires* direct distribution of the power to the retail consumer and that, in order to distribute directly, an entity *must* have control over its distribution system." (88a) (emphasis supplied).

Although this Court has made clear that considerable deference is due an agency charged with administering a statute, so long as the agency's construction is reasonable and consistent with the language and intent of the statute, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), when an agency bases its decision on something other than its own judgment, deference is inappropriate. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87-89 (1943); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953); *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169-70 (D.C. Cir. 1986); *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir.), *cert. denied*, 474 U.S. 948 (1985).

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[14] The Court of Appeals agreed with petitioner that neither the statute itself nor prior case law, including *MTA*, imposed eligibility criteria such as "control" of distribution. (14a). Indeed, a literal reading of the legislative history cited by the *MTA* court -- a statement by Senator Neuberger that under the NRA "the public operation will extend from the turbine to the reading lamp in the living room," *MTA*, supra n.4, 796 F.2d at 592 -- would mean that *all* functions, from generation to transmission to distribution, must be "public." Such a literal reading would disqualify many of the currently-eligible public bodies since they buy privately generated power and transmit power over the lines of investor-owned utilities. (R. 543-45). *See also Brazos Electric Power Cooperative, Inc. v. Southwestern Power Administration*, 819 F.2d 537 (5th Cir. 1987), *rehearing denied*, 828 F.2d 1083 (1987).

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Here, the Commission "did not rely upon 'its special administrative competence'" *Chenery*, *supra*, 318 U.S. at 92; or "on its own evaluation of the needs of the industry," *RCA*, *supra*, 346 U.S. at 94. Rather, the Commission relied on a mistaken reading of a Second Circuit decision. Ironically, the Second Circuit then deferred to that erroneous interpretation, bowing to the Commission's alleged expertise (14a), while claiming that "we might not have adopted these exact criteria had we analyzed these issues in the first instance" (16a). Under this Court's precedents, the Second Circuit should have remanded to the Commission because the Commission's conclusion "was not based on [its] own judgment but rather on the unjustified assumption" that the Court of Appeals had mandated the result. *RCA*, *supra*, 346 U.S. at 96. Petitioner is entitled to have the Commission exercise its independent judgment in defining a "public body".

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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